RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

EX PARTE JAMES T. EASTON AND JAMES McMAHON, PETITIONERS.

A contract for the use of a wharf by the master or owner of a vessel is a maritime contract, and as such cognizable in admiralty.

Such a contract, whether express or implied, if the vessel is a foreign one, or belongs to a port of another state, gives rise to a maritime lien against the vessel, which may be enforced by a proceeding *in rem* or by a suit *in personam* against the owner.

While there is no doubt of the jurisdiction of the Supreme Court to issue a writ of prohibition to the District Court, when proceeding as a court of admiralty and maritime jurisdiction, yet the facts upon which the court is to act must appear in the record.

PETITION for writ of prohibition to restrain the United States District Court for the Eastern District of New York from exercising jurisdiction in a proceeding *in rem*, to enforce an alleged lien for wharfage. The facts are sufficiently stated in the opinion of the court.

J. E. Gowen, for the petition.

F. A. Wilcox, contra.

The opinion of the court was delivered by

CLIFFORD, J.—Judicial power under the federal constitution extends to all cases of admiralty and maritime jurisdiction, and it was doubtless the intention of Congress, by the ninth section of the Judiciary Act, to confer upon the District Court the exclusive original cognizance of all admiralty and maritime causes, the words of the act being in terms exactly co-extensive with the power conferred by the constitution. In order, therefore, to determine the limits of the admiralty jurisdiction, it becomes necessary to ascertain the true interpretation of the constitutional grant. On that subject three propositions may be assumed as settled by authority, and to those it will be sufficient to refer, on the present occasion, without much discussion of the principles on which the adjudications rest: 1. That the jurisdiction of the district courts is not limited to the particular subjects over which the admiralty courts of the parent country exercised jurisdiction when our constitution was adopted; 2. That the jurisdiction of those courts does not extend to all cases which would fall within such jurisdiction according to the civil law and the practice and usages of conti-

nental Europe; 3. That the nature and extent of the admiralty jurisdiction conferred by the constitution must be determined by the laws of Congress and the decisions of this court, and by the usages prevailing in the courts of the states at the time the federal constitution was adopted. No other rules are known which it is reasonable to suppose could have been in the minds of the framers of the constitution than those which were then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts.

Authority is conferred upon the libellants as the proprietors of the wharf and slip in question by the law of the state to charge and collect wharfage and dockage of vessels lying at said wharf and within the slip adjoining the wharf of the libellants.

Sufficient appears to show that the respondents are the owners of the barge named in the libel; that on the 10th of October 1876, she completed a trip from the port of Baltimore for the port of New York, and that she took wharfage at the wharf or pier of the libellants, where she remained for eleven days. For the use of the berth occupied by the barge the libellants charged $34.20 as wharfage and dockage. Due demand was made, and payment being refused the libellants instituted the present suit, which is a libel *in rem*, against the barge to recover the amount of that charge. Process was served, and the respondents appeared and excepted to the libel, and set up that process of condemnation should not issue against the barge for the following reasons: 1. Because no maritime lien arises in the case for the matters set forth in the libel. 2. Because no lien in such a case is given for wharfage against boats or vessels by the laws of the state. 3. Because the law of the state referred to in the libel as giving a lien for wharfage is unconstitutional and void for the following reasons: 1. Because it imposes a restriction on commerce. 2. Because it imposes a duty of tonnage on all vessels of the character and description of that of the respondents. 3. Because it discriminates against the boats or barges of persons who are not citizens of the state where the proprietors of the wharf reside.

Pending the proceedings in the District Court, the respondents presented a petition here asking leave to move this court for a prohibition to the court below, forbidding the District Court to proceed further in the case. Pursuant to said petition, this court entered an order permitting argument upon the merits of the petition,

and directing that due notice be given to the libellants and the clerk of the District Court. Hearing was had in conformity to that order, and the case was held under advisement.

Power is certainly vested in the Supreme Court to issue the writ of prohibition to the District Court when that court is proceeding in a case of admiralty and maritime cognizance of which the District Court has no jurisdiction: 1 Stat. at Large 81; *United States* v. *Peters*, 3 Dall. 129. Where the District Court is proceeding in a cause not of admiralty and maritime jurisdiction, the Supreme Court cannot issue the writ, nor can the writ be used except to prevent the doing of something about to be done, nor will it ever be issued for acts already completed: *Ex parte Christy*, 3 How. 292; *United States* v. *Hoffman*, 4 Wall. 158.

Admiralty and maritime jurisdiction is conferred by the constitution, and Judge STORY says it embraces two great classes of cases—one dependent upon locality, and the other upon the nature of the contract. Damage claims arising from acts and injuries done within the ebb and flow of the tide have always been considered as cognizable in the admiralty, and since the decision in the case of the *Genesee Chief*, it is considered to be equally well settled that remedies for acts and injuries done on public navigable waters, not within the ebb and flow of the tide, may be enforced in the admiralty as well as for those upon the high seas and upon the coast of the sea.

Speaking of the second great class of cases cognizable in the admiralty, Judge STORY says, in effect, that it embraces all contracts, claims and services which are purely maritime, and which respect rights and duties appertaining to commerce and navigation: 2 Story Const., sect. 1666. Public navigable waters, where interstate or foreign commerce may be carried on, of course include the high seas, which comprehend, in the commercial sense, all tide waters to high-water mark. Maritime jurisdiction of the admiralty courts in cases of contracts depends chiefly upon the nature of the service or engagement, and is limited to such subjects as are purely maritime, and have respect to commerce and navigation within the meaning of the constitution.

Wide differences of opinion have existed as to the extent of the admiralty jurisdiction, but it may now be said, without fear of contradiction, that it extends to all contracts, claims and services essentially maritime, among which are bottomry bonds, contracts of affreightment, and contracts for the conveyance of passengers,

pilotage on the high seas, wharfage, agreements of consortship, surveys of vessels damaged by the perils of the seas, the claims of materialmen and others for the repair and outfit of ships belonging to foreign nations or to other states, and the wages of mariners, and also to civil marine torts and injuries, among which are assaults or other personal injuries, collision, spoliation and damage, illegal seizures or other depredations on property, illegal dispossession or withholding of possession from the owners of ships, controversies between the part owners as to the employment of ships, municipal seizures of ships, and cases of salvage and marine insurance: Conkl. Treatise, 5th ed., 254.

Wharf accommodation is a necessity of navigation, and such accommodations are indispensable for ships and vessels and watercraft of every name and description, whether employed in carrying freight or passengers, or engaged in the fisheries. Erections of the kind are constructed to enable ships, vessels and all sorts of watercraft to lie in port in safety, and to facilitate their operation in loading and unloading cargo, and in receiving and landing passengers. Piers or wharves are a necessary incident to every well-regulated port, without which commerce and navigation would be subjected to great inconvenience, and be exposed to vexatious delay and constant peril. Conveniences of the kind are wanted both at the port of departure and at the place of destination, and the expenses paid at both are everywhere regarded as properly chargeable as expenses of the voyage. Commercial privileges of the kind cannot be enjoyed where neither wharves nor piers exist, and it is not reasonable to suppose that such erections will be constructed for general convenience unless the proprietors are allowed to make reasonable charges for their use.

Compensation for wharfage may be claimed upon an express or an implied contract, according to the circumstances. Where a price is agreed upon for the use of the wharf, the contract furnishes the measure of compensation, and when the wharf is used without any such agreement the contract is implied, and the proprietor is entitled to recover what is just and reasonable for the use of his property and the benefit conferred.

Such erections are indispensably necessary for the safety and convenience of commerce and navigation, and those who take berth alongside them to secure those objects derive great benefit from their use. All experience supports that proposition, and shows to

a demonstration that the contract of the wharfinger appertains to the pursuit of commerce and navigation.

Instances may, doubtless, be referred to where wharves are erected as sites for stores and storehouses, but the great and usual object of such erections is to advance commerce and navigation by furnishing resting places for ships, vessels and all kinds of water-craft, and to facilitate their operation in loading and unloading cargo, and in receiving and landing passengers.

Nor is the nature of the service or the character of the contract changed by the circumstance that the water-craft which derived the benefit in the case before the court was without masts or sails or other motive power of her own. Sail-ships, and even steamships and vessels, are frequently propelled by tugs, and yet, if they secure a berth at a wharf or in a slip at the place of landing or at the port of destination, and actually occupy the berth as a resting-place or for the purpose of loading or unloading, no one, it is supposed, will deny that the ship or vessel is just as much liable to the wharfinger as if she had been propelled by her own motive power.

Neither canal boats nor barges ordinarily have sails or steam-power, but they usually have tow-lines, and it clearly cannot make any difference, as to their liability for wharfage, whether they are propelled by steam or sails of their own, or by tugs or horse- or mule-power, if it appears that the boat or barge actually occupied a berth at the wharf or slip at the commencement or close of the trip as a resting-place, or for the purpose of loading or unloading cargo, or for receiving or landing passengers. Goods to a vast amount are transported by such means of conveyance, and all experience shows that boats of the kind require wharf privileges as well as ships and vessels or any other water-craft engaged in navigation: *The Northern Belle*, 9 Wall. 328.

Access to the ship or vessel rightfully occupying a berth at a wharf, for the purpose of lading and unlading, is the undoubted right of the owner or charterer of such ship or vessel for which such right has been secured: *Wendell* v. *Baxter*, 12 Gray 496.

Privileges of the kind are essential to the carrier by water, whether he is engaged in carrying goods or passengers.

Repairs to a limited extent are sometimes made at the wharf, but contracts of the kind usually have respect to the voyage, and are made to secure a resting-place for the vessel during the time she is being loaded or unloaded. Such contracts beyond all doubt

are maritime, as they have respect to commerce and navigation, and are for the benefit of the ship or vessel when afloat.

Carrying vessels would be of little or no value, unless they could be loaded, and they are usually loaded from the wharf, except in a limited class of cases where lighters are employed, the vessel being unable to come up to the wharf in consequence of the shoalness of the water.

Accommodations at the port of destination are equally indispensable for the voyage as those at the port of departure. Consignments of goods and passengers must be landed, else the carrier is not entitled to freight or fare. Where the contract is to carry from port to port, an actual delivery of the goods into the possession of the owner or consignee or at his warehouse is not required in order to discharge the carrier from his liability. He may deliver them on the wharf, but to constitute a valid delivery there, the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods or to put them under proper care and custody. Delivery on the wharf, under such circumstances, is valid, if the different consignments be properly separated, so as to be open to inspection and conveniently accessible to their respective owners: *The Eddy*, 5 Wall. 495.

These remarks are sufficient to show that wharves, piers or landing-places are well nigh as essential to commerce as ships and vessels, and are abundantly sufficient to demonstrate that the contract for wharfage is a maritime contract, for which, if the vessel or water-craft is a foreign one or belongs to the port of a state other than the one where the wharf is situated, a maritime lien arises against the ship or vessel in favor of the proprietor of the wharf.

Standard authorities, as well as reason, principle and the necessities of commerce, support the theory that the contract for wharfage is a maritime contract, which in the case supposed gives to the proprietor of the wharf a maritime lien on the ship or vessel for his security. From an early period wharf-owners have been allowed to exact from ships and vessels using a berth at their wharves, a reasonable compensation for the use of the same, and the ship or vessel enjoying such a privilege has always been accustomed to pay to the proprietor of such wharf a reasonable compensation for the use of the berth: *The Kate Tremaine*, 5 Ben. 611. Ancient codes and treaties, such as are frequently recognised as the source from which the rules of the maritime law are drawn, usually

treat such contracts as maritime contracts, for which the ship or vessel is liable: *The Maggie Hammond*, 9 Wall. 452; *De Lovio* v. *Boit*, 2 Gall. 472.

Charges for wharfage were adjudged to be lien claims in the District Court of the Third Circuit more than seventy years ago, and in speaking of that case, Judge STORY says that it seems to him that the decision was fully supported in principle by the doctrines as well of the common law as of the civil law, and by the analogous cases of materials furnished and repairs made upon the ship: *Ship New Jersey*, 1 Pet. Adm. 228; *Ex parte Lewis*, 2 Gall. 484, where it was expressly adjudged that the contract was necessarily maritime, giving as the reason for the conclusion that the use of the wharf is indispensable for the preservation of the vessel: *Johnson* v. *McDonough*, Gilpin 103.

Other eminent admiralty judges have decided in the same way, and among the number the late Judge WARE, whose opinion in cases involving the question of admiralty jurisdiction is entitled to the highest respect: *The Phœbe*, Ware 341; 2 Conkl. Adm., 2d ed., 515; *Bark Alaska*, 3 Ben. 392; *Hobart* v. *Drogan*, 10 Pet. 120; *The Mercer*, 1 Sprague 284; *The Ann Ryan*, 7 Ben. 21; Dunlap Adm. 75; Abbott on Ship, 5th ed., 423.

Water-craft of all kinds necessarily lie at a wharf when loading and unloading, and Mr. Benedict says that the pecuniary charge for the use of the dock or wharf is called wharfage or dockage, and that is the subject of admiralty jurisdiction; that the master and owner of the ship and the ship herself may be proceeded against in admiralty to enforce the payment of wharfage, when the vessel lies alongside the wharf or at a distance, and only uses the wharf temporarily for boats or cargo: Benedict Adm., 2 ed., sect. 283.

Application for the writ of prohibition is properly made in such a case upon the ground that the District Court has transcended its jurisdiction in entertaining the described proceeding, and whether it has or not must depend not upon facts stated dehors the record, but upon those stated in the record upon which the District Court is called to act, and by which alone it can regulate its judgment. Mere matters of defence, whether going to oust the jurisdiction of the court or to establish the want of merits in the libellants' case, cannot be admitted under such a petition here to displace the right of the District Court to entertain suits, the rule being that every such matter should be propounded by suitable pleadings as a defence for

the consideration of the court, and to be supported by competent proofs, provided the case is one within the jurisdiction of the District Court: *Ex parte Christy*, 3 How. 308.

Congress has empowered the Supreme Court to issue writs of prohibition to the district courts "when proceeding as courts of admiralty and maritime jurisdiction," by which it is understood that the power is limited to a proceeding in admiralty: Conkl. Treatise, 5th ed., 56. Such a writ is issued to forbid a subordinate court to proceed in a cause there depending on suggestion that the cognizance thereof belongeth not to the court: F. N. B. 39; 3 Bl. Com. 112; 2 Pars. on Ship. 193; 3 Bac. Abr. 206.

Viewed in the light of these considerations, it is clear that a contract for the use of a wharf by the master or owner of a ship or vessel is a maritime contract, and as such it is cognizable in the admiralty; that such a contract being one made exclusively for the benefit of the ship or vessel, a maritime lien in the case supposed arises in favor of the proprietor of the wharf against the vessel for payment of reasonable and customary charges in that behalf for the use of the wharf, and that the same may be enforced by a proceeding *in rem* against the vessel, or by a suit *in personam* against the owner.

Many other questions were discussed at the bar which will not be decided at the present time, as they are not properly involved in the application before the court.

Petition for prohibition denied.

A maritime lien depends neither upon possession nor the right of possession. Far from contemplating either, the maritime law confers a lien for supplies, repairs or bottomry, because they give the ship strength and speed to pursue her course, a lien not followed by the right of possession except by virtue of a judicial decree, "a right which enables a creditor to institute a suit to take a thing from any one who may possess it and subject it by a sale to the payment of his debts, which so inheres in the thing as to accompany it into whosesoever hands it may pass by a sale, which is not divested by a forfeiture, or mortgage, or other encumbrance created by the debtor, can only be a *jus in re* in contradistinction to a *jus ad rem*, or in contradistinction to a mere personal right or privilege. Though tacitly created by the law, and to be executed only by the aid of a court of justice, and resulting in a judicial sale, it is as really a property in the thing as the right of a pledge or the lien of a builder for work:" *The Young Mechanic*, 2 Curt. 406. See also *The Bold Buccleugh*, 7 Moore P. C. Cases 267; and *The Brig Nestor*, 1 Sumner 83.

At common law a wharfinger was allowed a lien, among other reasons, because any vessel that chose being licensed to use his wharf it was thought fair to ensure his compensation. But this lien like all others at common law

was lost by loss of possession, unless held to be maintained constructively, because the possession had been fraudulently changed.

In England the courts of common law waged a war as jealous and more successful against the admiralty than against chancery. They were stimulated not only by the natural desire to enlarge their own phylacteries, but by their dislike of processes akin to those of the civil law. By an oppressive construction of the statutes of Richard II. defining its jurisdiction they confined the admiralty to torts done and contracts made and to be performed upon the high seas. All other maritime cases fell into the common law and a very curious experience they underwent in the new forum. Because, although the courts of common law admitted the principles of the maritime law in such cases, yet they were unable to provide a remedy, having no processes to enforce a lien unaccompanied by possession. By the statutes 3 & 4 Vict. C. 65 and 24 Vict. 10, the jurisdiction of the admiralty has been greatly extended.

In section 2 of article 3 of the constitution the judicial power of the United States was extended "to all cases of admiralty and maritime jurisdiction," and it became at once a mooted question whether the jurisdiction intended was that exercised, at the time of our separation, by the admiralty in England, dwarfed by the jealousy of the common law, or whether it was the liberal jurisdiction of all causes really maritime, as allowed to the admiralty in other commercial nations. This question was set at rest by Judge STORY, in the learned case of *De Lovio* v. *Boit*, 2 Gall. 475, in which the clause received the most liberal and comprehensive construction. "If we examine the etymology or received use of the words 'admiralty' and 'maritime jurisdiction,' we shall find that they include jurisdiction of all things done upon and relating to the sea." The conclusions arrived at in this controversy are stated by Mr. Justice CLIFFORD in three propositions at the beginning of the principal case.

The libel filed in the United States District Court being *in rem*, the petitioners in the Supreme Court would have been entitled to the prohibition, if they could have established that wharfage is not a maritime contract conferring the right of lien.

Maritime contracts are classified into those which are so because of locality and those which are so because of subject-matter. Wharfage, if a maritime contract, must belong to the latter class, which Judge STORY, in sec. 1666 of his work on the constitution, says includes "contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation;" and in sec. 1671, enumerating them more at length, "the claims of materialmen and others for repairs and outfits of ships belonging to foreign nations or other states; bottomry bonds for moneys lent to ships in foreign ports, to relieve their distresses and enable them to complete their voyages; surveys of vessels damaged by perils of the seas; pilotage on the high seas; and suits for mariners' wages."

We are disposed to think that Mr. Justice CLIFFORD'S vindication of the usefulness of wharves and of the general doctrines of assumpsit alone would not convince the reader that wharfage is a maritime contract and entitled to a lien, it being by no means true that all services to ships, even when very useful and deserving of compensation, are maritime or entitled to maritime liens. For instance, a stevedore has no lien for discharging the cargo: *The Amstel*, Blatch. & Howl. 215; *McDermott* v. *The Owens*, 1 Wall, Jr. 370. Nor are lighterage or services in compressing

the cargo for shipment entitled to a lien: *The Bark Joseph Cunard*, Scott Adm. 120. Nor has one employed to watch and visit a ship at anchor, open her hatches for ventilation and try her pumps, a lien: *Gurney* v. *Crockett*, Abb. Adm. 490. Nor one employed to scrape and clean the bottom of a ship in any dock: *Bradley* v. *Bolles*, Id. 569. Therefore, we shall proceed to consider the cases cited by the court in support of the judgment.

The father of them all is *Gardner* v. *The Ship New Jersey*, 1 Pet. Adm. 223, in which a ship's physician applied to be paid out of the surplus proceeds of the ship, which had been sold under a decree upon a libel for seamen's wages in the registry of the court. Judge PETERS refused to do so on the ground that no claim not a lien upon the ship should be paid out of her proceeds. In mentioning claims which should be so paid, he said: "Wharfage has been allowed out of proceeds, as the wharfinger might detain the ship until payment." This case is the first authority upon the subject, and invariably referred to, and it is curious that a remark entirely *obiter*, that wharfage is a common-law lien, should have resulted in a Supreme Court decision that it is a maritime lien.

The next case is *Ex parte Lewis*, 2 Gall. 483, which was an application by a wharfinger to be paid dockage out of the proceeds of a ship in the registry, which had been arrested while at his wharf, under a decree of the admiralty, and sold. Judge STORY, relying on the former case, said it was a lien, but that he also regarded it as a common-law lien may be seen from the case cited, viz., *Nayler* v. *Mangles*, 1 Esp. 109, a case of assumpsit, in which Lord KENYON decided that a wharfinger had by usage a lien for the balance of a general account upon goods deposited on his wharf; *Spears* v. *Hartley*, 3 Esp. 81, a case of trover, in which Lord ELDON applied the lien in favor of a wharfinger to secure a balance of an account barred by the Statute of Limitations, and *Savill* v. *Richards*, 4 Esp. 53, also trover, in which Lord KENYON sustained the lien in favor of a dyer.

Then comes the *St. Jago de Cuba*, 9 Wheat. 418, also a claim upon proceeds, in which JOHNSON, J., says: "There is, however, one item in this account, to the amount of three or four hundred dollars, which is good against all the world. This was for wharfage."

In *Johnson* v. *The McDonough*, Gilpin 103, it was contended that the wharfinger had lost his lien, and, therefore, his right to be paid out of the proceeds, because the schooner had left his wharf and gone to another before she was sold, but Judge HOPKINSON said: "It was long since decided in this court by Judge PETERS, that wharfage is allowed out of proceeds, as the wharfinger might detain the ship until payment; in other words, that a wharfinger has a lien upon the vessel for his wharfage. Judge STORY, in the *Case of Lewis*, 2 Gall. 483, has recognised and affirmed this principle. In this case it has not been questioned, but it has been insisted by the district attorney that the lien was lost by the loss of the possession of the schooner. It is certainly true that when the possession of a chattel is voluntarily given up, or other security is taken for the debt, the lien is abandoned," and then he goes on to say that the vessel having been removed without the consent and against the protest of the wharfinger it is not lost in this case.

Judge WARE, in *The Phœbe*, Ware 355, also allowed wharfage to be paid out of the proceeds in the registry, speaking of the lien as one which would be lost by loss of possession.

In none of the cases cited had there been any proceeding *in rem* for wharfage against the ship. They were simply applications to share in the funds and need not have been for that purpose

maritime rights, because the admiralty having taken jurisdiction of the *res* and converted it into money could enforce any lien against the proceeds: *Carryl* v. *Taylor*, 20 How. 483.

In the case of *The General Smith*, 4 Wheat. 438, a materialman in the state of Maryland having filed a libel *in rem* against a domestic ship, it was objected that the common law, which was the law of Maryland, did not recognise any lien apart from possession for supplies furnished or repairs done to a domestic ship. This view the court, Judge STORY delivering the opinion, sustained on the ground that the ship being a domestic one the question of lien must be settled by the municipal law. This was certainly following the common law in a distinction between domestic and foreign ships not recognised by the maritime law further than might have been expected from one who had been mainly instrumental in rejecting the unreasonable limits it had put upon the admiralty. What was implied in this case, viz., that when the local law gave a lien against domestic vessels it would be enforced in the federal courts, was positively decided in subsequent cases: *The Calisto*, Davies 31; *Davis* v. *Child*, Id. 78; *Peyloun* v. *Howard*, 7 Pet. 342; and in accordance with these decisions was Admiralty Rule 12, 1844. "In all suits by materialmen for supplies or repairs or other necessaries for a foreign ship or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem* or against the master or the owner alone *in personam*. And the like proceedings *in rem* shall apply to cases of domestic ships where by the local law a lien is given to materialmen for supplies, repairs or other necessaries."

In *Russell* v. *The Asa R. Swift*, Newberry 553, a wharfinger to whom the local law gave a lien for wharfage had proceeded *in rem* against the Asa R. Swift, a domestic vessel. The court decided that this lien could not be enforced in admiralty by virtue of Rule 12, because it applied only to liens given to materialmen, which a wharfinger could not be considered to be. Nor could it be considered a maritime lien and enforceable as such, it being a lien at common law requiring possession, as had been held by Mr. Justice STORY in *Ex parte Lewis*, *supra*. "Mr. Justice STORY, who drew up these rules, makes this distinction in *Ex parte Lewis*, 2 Gall. 483. But wharfage not being a lien under the general maritime law, and only such by the statute of the state, the claim as regards the occasional occupation of the Canada wharf, is only enforceable as a *common-law lien*. As such, the wharfinger could detain the vessel until payment, but if he failed to do this and parted with his temporary possession, his lien ceased, and such was the ruling of Mr. Justice STORY, in the case already cited from 2 Gallison."

In 1859, Rule 12 was amended by substituting for the last sentence the following: "And the like proceedings *in personam*, but not *in rem*, shall apply to cases of domestic ships for supplies, repairs or other necessaries." This amendment was evidently made to correct the direction taken in the case of *The General Smith*, as clearly appears in *Maguire* v. *Card*, 21 How. 248.

In the case of the *Canal Boat Kate Tremaine*, 5 Ben. 60, a libel *in rem* had been filed for wharfage against a domestic vessel, the local law conferring a lien for wharfage. Judge BENEDICT took the ground that wharfage was, on the authority of the cases cited above, a maritime contract conferring the right of lien and as such enforceable in admiralty. A wharfinger not being a materialman, Rule 12 did not apply, and the decision resting upon the ground that wharfage was a lien by the maritime law, it was not necessary to discuss the effect of the local law conferring a lien under the case of *The General Smith* and admiralty Rule 12 as amended.

McKENNAN, J., of the United States Circuit Court, in the case of *Storage Co.* v. *The Barque Thomas*, 29 Leg. Int. 116, decided in the Eastern District of Pennsylvania, said, "The libellants are wharfingers at Philadelphia, and presented their libel *in rem* to the District Court to enforce the payment of wharfage as a maritime lien, upon the respondent's vessel. There is no authoritative adjudication that a claim of this sort stands upon such a footing. Certainly it has not been so decided by the Supreme Court. The weight of judicial opinion is the other way. It has generally been treated only as a common-law lien, to be enforced by the detention of the vessel by the wharfinger, or to be recognised and paid as such out of the proceeds of the sale of the vessel, which had been brought under the control of the court, otherwise than by an original libel filed upon the dockage demand. This is the import of the opinion of Judge PETERS, in *The New Jersey*, 1 Pet. Adm. 223, and of Mr. Justice JOHNSON, in *The St. Jago de Cuba*, 9 Wheat. 418, and I do not regard the opinion of Judge STORY, in *Ex parte Lewis*, 2 Gall. 483, as determining a different rule. Until the Supreme Court shall decide otherwise, I see no reason for expanding the admiralty cognizance of a demand which rests securely upon a basis of common-law right and for the enforcement of which, by the wharfinger himself, the common law supplies an effectual remedy. The disallowance of the libel by the District Court is therefore affirmed." The decree in the United States District Court was entered by Judge CADWALADER, than whom no man would be less likely to go wrong on a point of maritime law or usage.

The decision in the *Kate Tremaine*, *supra*, was followed in *The Alexander McNeill*, 20 Int. Rev. Record 175, decided in the United States District Court at Savannah, Ga. They were the only cases which we know deciding positively that wharfage is a maritime contract and entitled to a maritime lien, and with the opposite decision: *Russell* v. *The Asa R. Swift*, *supra*; *The Gem*, 1 Brown's Adm. 37, and *The Storage Co.* v. *Barque Thomas*, *supra*, were the only ones in which proceedings *in rem* were instituted for wharfage. So far as Judge BENEDICT'S views depend upon previous American decisions, they are ill-supported and they do not appear to be in harmony with the case of *The General Smith*, or with Rule 12 in Admiralty as amended, both of which, rejecting the principle of the civil and maritime law, followed the lead of the English courts in distinguishing, as regards the right of lien, between foreign and domestic ships.

With the law in this condition, the Supreme Court has by the principal case settled the question in accordance with Judge BENEDICT'S views. It is true that in this case, the barge was foreign, whereas the *Kate Tremaine* was domestic, but the opinion states the law broadly and flatly without qualifications as he did. If there is any danger to be feared from the language used, it is that it may confirm a very general disposition to suppose that every contract with a master is a maritime contract and that every maritime contract will support proceedings *in rem*. Perhaps it is not profitable to speculate whether the decision is a correct deduction from the cases cited, because it has *effectually* laid all doubts as to whether wharfage is entitled to a maritime lien.

H. G. W.

Supreme Court of Indiana.

STEIN v. HAUCK.

An easement in light and air, to be supplied to the ancient windows of one person from the premises of another, cannot be acquired in Indiana by mere use or prescription.

By the act of this state "touching easements" (1 R. S. 1876, p. 436), the legislature intended neither to recognise nor adopt the English rule in relation to easements in light and air, but to prevent the future acquisition of such easements, except in conformity with the provisions of such statute.

FROM the Dearborn Circuit Court. This was an action, brought by the appellee, to establish, by use, an easement in light, to be supplied to his ancient windows from the premises of the appellant. The complaint alleged such use, uninterruptedly, during twenty years, acquiesced in by the vendor of the appellant, and by the appellant after his purchase; and that after such use and acquiescence the appellant erected upon his own premises a frame structure, which effectively and permanently obstructed the light from the windows of the appellee. The sufficiency of the facts alleged in the complaint to maintain the action was questioned by a demurrer, which was overruled.

N. S. Givan and *W. H. Matthews*, for appellant.

J. Schwartz, for appellee.

The opinion of the court was delivered by

BIDDLE, J.—Exceptions were taken to the rejection of certain evidence; also, to the giving of certain instructions to the jury, and to the sufficiency of the evidence to sustain the verdict, upon all of which questions are presented for our decision; but the fundamental question in the case, which must be answered before the rights of the parties can be ultimately settled, continually recurs to us, namely, Can an easement in light and air, to be supplied to the ancient windows of one from the premises of another, be acquired by use or prescription in the state of Indiana? We therefore proceed at once to the examination of this question.

We read much in our books about the common-law right in England of an easement, acquired by use or prescription, in light or air coming to ancient windows from the premises of another; but when the history of the right is carefully studied, it will be found that it was sometimes disputed. It was denied in the case

of *Bury* v. *Pope*, 1 Cro. Eliz. 118, and, under the reign of Charles II., in the case of *Palmer* v. *Fletcher*, 1 Lev. 122. It was modified by the custom of London, and, indeed, was never indisputably settled until it was established by the statute of 3 Will. 4, c. 71, sec. 3. But, assuming that such an easement was a common-law right in England, before the statute of William IV., the question whether it is a common-law right in the state of Indiana has never before been directly presented to this court. In the case of *Keiper* v. *Klein*, 51 Ind. 316, the question was incidentally noticed; but that case turned upon the question whether a certain deed conveyed such an easement by implication, not whether it could be acquired by use or prescription. And it has been held, that the common law, as a system, is adopted in this state, except such parts of it as are inconsistent with our institutions or not suited to the condition of the country. In the case of *Robeson* v. *Pittenger*, 1 Green Ch. 57, it is held, that when ancient lights have existed for upwards of twenty years, undisturbed, the owner of an adjoining lot has no right to obstruct them; but this case was decided mainly on the authority of *Story* v. *Odin*, 12 Mass. 157, which has long ceased to be the law of Massachusetts; for in the case of *Randall* v. *Sanderson*, 111 Mass. 114, decided more than sixty years later, it is expressly held, that "it is the established law, in this Commonwealth, that an easement of light and air cannot be acquired by prescription," in support of which many cases are cited. In the case of *Durel* v. *Boisblanc*, 1 La. Ann. 407, where the easement of light to a window was coupled with the right of way through a passage, it was held that they could not be obstructed; but the decision was expressly placed upon the ground that these servitudes were visible and palpable, and, on examination of the property, the purchaser must have seen them, the court remarking that "could we believe that he was ignorant of them, a very different case would have been presented." In the case of *Gerber* v. *Grabel*, 16 Ill. 217, it is held that "twenty years' uninterrupted and unquestioned enjoyment of lights constitutes them ancient lights, in the enjoyment of which the owner will be protected." But CATON, J., in a separate opinion, evidently doubts the wisdom of the rule, and TREAT, C. J., dissented. These three cases are all the decisions we can find, and these three states—New Jersey, Louisiana and Illinois—the only states which have adopted the English rule concerning easements in light and

air, acquired by use or prescription, and the case in Illinois is the only one fully in accord with the English decisions, and is based upon a full adoption of the English common law by a statute of the state.

Against these decisions we have many American authorities. In *Napier* v. *Bulwinkle*, 5 Rich. 311, it is held that, "In the case of a window, which gives no cause of action to the owner of the space over which it looks, he is not bound to obstruct within twenty years to prevent the acquisition of a right; and without some other circumstance, from which his assent to the easement as a right may be inferred, his grant cannot be presumed from the mere unobstructed enjoyment." In *Parker* v. *Foote*, 19 Wend. 309, that eminent jurist, BRONSON, J., in delivering the opinion of the court, says: "There is, I think, no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England; and I see that it has recently been sanctioned with some qualification by an act of Parliament: Stat. 2 & 3 Will. 4, c. 71, sec. 3. But it cannot be applied in the growing cities and villages of this country, without working the most mischievous consequences. * * * Nor do I find that it has been adopted in any of the states." This doctrine is fully approved in *Cherry* v. *Stein*, 11 Md. 1.

In Iowa, the English doctrine is held inapplicable: *Morrison* v. *Marquardt*, 7 Am. Law Reg. N. S. 336, s. c. 24 Iowa 35. In *Powell* v. *Sims*, 5 W. Va. 1, the English common law of ancient lights was disapproved. Ohio has decided that "An easement in light and air, to be supplied to one's windows from the premises of another, cannot be acquired * * * by use or prescription:" *Mullen* v. *Stricker*, 19 Ohio St. 135. See also *Banks* v. *The American Tract Society*, 4 Sandf. Ch. 438. We have already cited *Randall* v. *Sanderson*, 111 Mass. 114, which is supported by the following cases: *Fifty Associates* v. *Tudor*, 6 Gray 255; *Rogers* v. *Sawin*, 10 Id. 376; *Carrig* v. *Dee*, 14 Id. 583. Massachusetts has long since abrogated the English doctrine by statute. Mr. Washburn says: "The tendency of late years, in this country, has been against the doctrine of gaining a prescriptive right to the enjoyment of light and air, as an easement appurtenant to an estate, on the ground that it is incompatible with the condition of a country which is undergoing such radical and rapid changes in the progress of its growth:" 2 Washb. Real

Prop. 346; and he cites the states of New York, Massachusetts, South Corolina, Maine, Maryland, Alabama, Pennsylvania and Connecticut, as having discarded the English doctrine; to which list of states he might have added Ohio, Iowa and West Virginia, as we have seen by the authorities cited, *supra*. In several of the states, the question seems to be yet undecided.

It may not be unprofitable to reason a moment upon the propriety of following the current of American authorities upon this question, to which a few exceptional cases seem as but eddies. In the first place, an easement in light or air is unlike any other easement known to the law. It is neither an appurtenance nor a hereditament. No definition of property known to the law includes it specifically. No exclusive right can be had in light or air; legislation cannot create such a right, because man has no exclusive dominion over them. They are for all in common, "and upon whom doth not his light arise?" Job 25: 3. And "The wind bloweth where it listeth, and thou hearest the sound thereof, but canst not tell whence it cometh, and whither it goeth:" St. John 3: 8. To give a right of property in light or air, which can control the right to the use of land, is to make the incident greater than the principal, and allow the shadow to control the substance.

Second, the owner of open space may not know, and cannot know of right, the internal arrangement of his neighbor's house; and may "stand by" while the invading claim, which is finally to embarrass, if not to destroy, the usefulness of his land, is gradually accruing against him, until it becomes a vested right, which he cannot dispute.

Third, if he knows that the right is accruing against him, he has no right of action against the person who enjoys his light or air, to prevent it, because he has not, and cannot have, any exclusive property in the light or air which occupies his space; he has nothing, therefore, to do, except to stand by and lose his rights, or erect his obstruction within a given time, simply for the purpose of protecting what was already his own. Besides,—

Fourth, the injury of such an easement to the land, which can be used only in the one place where it is, is so great, compared with the value of the easement in light or air, which can be had and used everywhere, that no such easement ought to be acquired by use or prescription, against one who may not know that it is accruing, or knowing it, can defend against it only by suffering

expense and inconvenience. The boundaries of the land are generally sufficient for the supply of its own light and air; and we do not see why the owner should be allowed to go beyond them to supply himself with these blessings, against the rights of another; or to throw that which was granted to him as a favor, into an injury to the grantor.

Upon these authorities, and for these reasons, we are prepared to hold, as the law of this state, that no one can acquire an easement in light or air, to be supplied from the premises of another, by mere use or prescription. We cannot see that this rule will work injury to any one; and we think it will place these impalpable and invisible claims upon a safe footing, consistent with the rights of all concerned. It is very easy to reserve such an easement to the vendor, or grant it to the vendee, in the deed which conveys the land, or to create it by any valid contract; then each one knows what he sells, and what he buys, and all persons are protected in their rights. Embarrassments have accumulated, and injuries have been suffered to property, growing out of the unsettled views upon this question. It should be put to rest. No one should stand in danger of unwittingly suffering burdens to be laid upon his property, nor be constantly compelled to guard against such an insidious invasion of his rights.

But the appellee insists that the state of Indiana has recognised, if not adopted, the English rule with regard to easements in light and air, acquired by use or presciption; that the allegations of fact in his complaint bring his case within the rule; that the evidence proves the facts to be true; and, therefore, that the judgment should be affirmed. The statute to which he refers is as follows:

"Sec. 1. That the right of way, air, light or other easement, from, in, upon, or over, the land of another, shall not be acquired by adverse use, unless such use shall have been continued uninterruptedly for twenty years:" 1 R. S. 1876, p. 436.

Sections second, third and fourth, provide means by which the owner of the land may prevent the acquisition of such an easement against him.

We do not concur with the views of the appellee, in reference to the construction of this statute; and instead of giving our own reasons for our conclusion, we have found a decision upon a statute similar to the one cited, indeed almost literally the same, which is so directly in point that we have adopted its language as our own.

"It is provided by statute c. 147, sec. 14, that 'no person shall acquire any right or privilege of way, air, or light, or any other easement, from, in, upon, or over the land of another by the adverse use or enjoyment thereof, unless such use shall have been continued uninterrupted for twenty years.' The following sections prescribe the mode, by which the acquisition of such rights may be prevented. It is obvious, that these enactments were not designed to create or give such rights, or to determine when or upon what terms they had already been acquired. These matters were left to be decided by the law as it previously existed. The design was to prevent their future acquisition without conformity to certain prescribed conditions. It does not even appear to have been intended to declare, that they would in future be acquired by virtue of the statute merely, but rather to prevent their acquisition without conformity to its provisions, leaving the decision to the previously existing law, whether any would be acquired:" *Pierre* v. *Fernald*, 26 Me. 436.

Doubtless our legislature, if it had intended to create such a right as is claimed by the complaint before us, or to declare that such a right already existed at common law, would have expressed itself in direct language to that effect; but, not having done so, we can give the statute no wider interpretation than its language warrants; and, as the right to the easement claimed did not exist in the state of Indiana by the common law, and has not been created by statute, it cannot be upheld. As to the principle of construing a statute which recognises a right, but does not expressly create it, see *Deutschman* v. *The Town of Charlestown*, 40 Ind. 449.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the complaint, and for further proceedings.

Notwithstanding a few early American opinions to the contrary, it is now quite well settled in this country that no right to light and air is acquired laterally over the land of an adjoining proprietor, by mere use or prescription for any length of time. The short ground of the decisions being, 1st, that the making of a window in one's own building, on his own land, though looking out over the land of his neighbor, is no encroachment on his neighbor's rights, and cannot therefore be regarded as *adverse* to him; it lacks therefore one of the chief elements of a prescriptive right; 2d, that the English doctrine is not applicable to the state of things in this country, and would, if applied, work mischievous consequences in our cities and villages.

To Judge GOULD of Connecticut is apparently due the credit of having first

doubted, if not denied, that the English rule ought to be adopted in this country, and of suggesting that possibly the early English cases might be accounted for on the ground that in each case the window, claiming the right, overhung or projected over the adjoining estate, so that it constituted in and of itself an encroachment or encumbrance upon the adjoining property, and thus by twenty years' existence acquired the right to continue. But this fact, if so, might give the right to continue the window or overhanging structure in its place, but would not therefore necessarily establish the right to look out over the neighboring land. The right of the window *to be* might be thus acquired, but not for persons to enjoy the prospect out of it.

In 1838 this question, having been indirectly admitted in *Mahan* v. *Brown*, 13 Wendell 263, directly arose in the Supreme Court of New York, in *Parker* v. *Foote*, 19 Wendell 308; an action on the case for obstructing the light to the plaintiff's house, which he had erected twenty-four years before upon a lot of land he had bought of the defendant himself, who had after that lapse of time erected a building on his remaining lot, and thus obstructed the light to the plaintiff's window. The plaintiff's claim was not admitted, and as this may be called the leading case in America, on this side of the question, we give the following extract from the opinion of BRONSON, J. In answer to the argument derived from other instances of easements acquired by use or prescription, he says:—

"As neither light, air nor prospect can be the subject of a *grant*, the proper presumption, if any, to be made in this case is, that there was some *covenant* or *agreement* not to obstruct the lights: *Cross* v. *Lewis*, 2 B. & C. 628, per BAYLEY, J.; *Moore* v. *Rawson*, 3 Id. 332, per LITTLEDALE, J. But this is a matter of little moment. Where it is proper to indulge any presumption for the purpose of quieting possession, the jury may be instructed to make such an one as the nature of the case requires: *Eldridge* v. *Knott*, Cowp. 214.

"Most of the cases on the subject we have been considering relate to *ways*, *commons*, *markets*, *watercourses*, and the like, where the user or enjoyment, if not rightful, has been an immediate and continuing injury to the person against whom the presumption is made. His property has either been invaded, or his beneficial interest in it has been rendered less valuable. The injury has been of such a character that he might have immediate redress by action. But in the case of *windows* overlooking the land of another, the injury, if any, is merely ideal or imaginary. The light and air which they admit are not the subjects of property beyond the moment of actual occupancy; and for overlooking one's privacy no action can be maintained. The party has no remedy but to build on the adjoining land opposite the offensive window: *Chandler* v. *Thompson*, 3 Camp. 80; *Cross* v. *Lewis*, 2 B. & C. 686, per BAYLEY, J. Upon what principle the courts in *England* have applied the same rule of presumption to two classes of cases so essentially different in character, I have been unable to discover. If one commit a daily trespass on the land of another, under a claim of right to pass over, or feed his cattle upon it, or divert the water from his mill, or throw it back upon his land or machinery, in these and the like cases, long-continued acquiescence affords strong presumptive evidence of right. But in the case of lights, there is no *adverse user*, nor indeed any use whatever of another's property, and no foundation is laid for indulging any presumption against the rightful owner.

"Although I am not prepared to adopt the suggestion of GOULD, J., in *Ingraham* v. *Hutchinson*, 2 Conn. 597, that the lights which are protected may be such as *project* over the land of the

adjoining proprietor; yet it is not impossible that there are some considerations connected with the subject which do not distinctly appear in the reported cases. See *Knight* v. *Halsey*, 2 Bos. & P. 206, per ROOKE, J.; 1 Phil. Ev. 125.

"The learned judges who have laid down this doctrine have not told us upon what principle or analogy in the law it can be maintained. They tell us that a man may build at the extremity of his own land, and that he may *lawfully* have windows looking out upon the lands of his neighbor: 2 B. & C. 686; 3 Id. 332. The reason why he may lawfully have such windows must be because he does his neighbor no wrong; and indeed so it is adjudged, as we have already seen; and yet, somehow or other, by the exercise of a lawful right in his own land for twenty years, he acquires a beneficial interest in the land of his neighbor. The original proprietor is still seised of his fee, with the privilege of paying taxes and assessments, but the right to build on the land, without which city and village lots are of little or no value, has been destroyed by a lawful window. How much land can thus be rendered useless to the owner remains to be settled: 2 B. & C. 686; 2 Car. & P. 465; 5 Id. 438. Now what is the acquiescence which concludes the owner? No one has trespassed upon his land, or done him a legal injury of any kind. He has submitted to nothing but the exercise of a *lawful* right on the part of his neighbor. How then has he forfeited the beneficial interest in his property? He has neglected to incur the expense of building a wall twenty or fifty feet high, as the case may be—not for his own benefit, but for the sole purpose of annoying his neighbor. That was his only remedy. A wanton act of this kind, although done on one's own land, is calculated to render a man odious. Indeed, an attempt has been made to sustain an action for erecting such a wall: *Mahan* v. *Brown*, 13 Wend. 261. There is, I think, no principle upon which the modern *English* doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in *England;* and I see that it has recently been sanctioned with some qualification by an Act of Parliament: Stat. 2 & 3 Will. 4, c. 71, s. 3. But it cannot be applied in the growing cities and villages of this country without working the most mischievous consequences. It has never, I think, been deemed a part of our law: 3 Kent's Com. 446, note [a].

"Nor do I find that it has been adopted in any of the states. The case of *Story* v. *Odin*, 12 Mass. 157, proceeds on an entirely different principle. It cannot be necessary to cite cases to prove that those portions of the common law of England which are hostile to the spirit of our institutions, or which are not adapted to the existing state of things in this country, form no part of our law. And besides, it would be difficult to prove that the rule in question was known to the common law previous to the 19th of April 1775: Const. N. Y., art. 7, § 13. There were two Nisi Prius decisions at an earlier day (*Lewis* v. *Price*, in 1761, and *Dongal* v. *Wilson*, in 1763), but the doctrine was not sanctioned in Westminster Hall until 1786, when the case of *Darwin* v. *Upton* was decided by the K. B.: 2 Saund. 175, note [2]. This was clearly a departure from the old law: *Bury* v. *Pope*, Cro. Eliz. 118."

This decision has often been approved in New York, and may be considered the settled law of that state. See *Myers* v. *Gemmel*, 10 Barb. 537 (1851); *Doyle* v. *Lloyd*, 54 N. Y. 439 (1875).

In 1847, the Supreme Court of Maine, in *Pierre* v. *Fernall*, 26 Me. 436, in well expressed language thus stated the objections to the English rule:—

"Nothing in the law can be more certain than one's right to occupy and use his own land as he pleases, if he does not thereby injure others. He may build upon it, or occupy it as a garden,

grass-plat or passage way, without any loss or diminution of his rights. No other person can acquire any right or interest in it, merely on account of the manner in which it has been occupied. When one builds upon his own land immediately adjoining the land of another person and puts out windows overlooking that neighbor's land, he does no more than exercise a legal right. This is admitted: *Cross* v. *Lewis*, 2 B. & C. 686. By the exercise of a legal right he can make no encroachment upon the rights of his neighbor, and cannot thereby impose any servitude or acquire any easement by the exercise of such a right for any length of time. He does no injury to his neighbor by the enjoyment of the flow of light and air, and does not, therefore, claim or exercise any right adversely to the rights of his neighbor. Nor is there anything of similitude between the exercise of such a right and the exercise of rights claimed adversely. It is admitted in the case supposed that no adjoining landowner can obtain redress by any legal process. In other words, that his rights have not been encroached upon; and that he has no cause of complaint. And yet, while thus situated for more than twenty years, he loses his right to the free use of his land, because he did not prevent his neighbor from enjoying that which occasioned him no injury and afforded him no just cause of complaint. The result of the doctrine is, that the owner of land not covered by buildings, but used for any other purpose, may be deprived of the right to build upon it by the lawful acts of the owner of the adjoining land performed upon his own land and continued for twenty years.

"It may be safely affirmed that the common law contained no such principle. The doctrine as stated in the more recent decisions appears to have arisen out of the misapplication in England of the principle, by which rights and easements are acquired by the adverse claim and enjoyment of them for twenty years, to a case in which no adverse or injurious claim was either made or enjoyed."

The courts of Pennsylvania also deny the application of the English doctrine to our situation: *Hoy* v. *Sterrett*, 2 Watts 381 (1833); *Wheatley* v. *Bough*, 25 Penna. St. 532 (1855); more emphatically repeated in *Haverstick* v. *Sipe*, 33 Id. 568 (1859).

In South Carolina, it was long thought that the English rule was sanctioned by the language used in *McCready* v. *Thomson*, Dudley 131 (1838), but upon full consideration of the arguments and authorities the opposite view was subsequently taken and fully adopted by the Court of Appeals, although the use had continued over fifty years: *Napier* v. *Bulwinkle*, 5 Rich. 311 (1852).

Massachusetts has fully adopted the same doctrine. It was first suggested by counsel in that state in *Atkins* v. *Chilson*, 7 Metc. 402 (1844), but it became unnecessary to decide it, and again in *Fifty Associates* v. *Tudor*, 6 Gray 259 (1856), but subsequently it was fully approved and followed in *Rogers* v. *Sawin*, 10 Gray 376 (1858); in *Carrig* v. *Dee*, 14 Id. 583 (1860); and in many other cases since: *Richardson* v. *Pond*, 15 Gray 387 (1860); *Paine* v. *Boston*, 4 Allen 169 (1862); *Randall* v. *Sanderson*, 111 Mass. 119 (1872), quite overruling any earlier dicta to the contrary. And it was held immaterial that the sill of the overlooking window projected over the boundary line so as to overhang the neighbor's land, or that the window itself would swing outward over the same.

In Maryland, also, notwithstanding the dictum to the contrary in *Wright* v. *Freeman*, 5 H. & J. 477, the English rule is now entirely repudiated: *Smith* v. *White*, and *Cherry* v. *Stein*, 11 Md. 23 (1858).

It is true, the Maryland courts still hold that such a right may be acquired by an implied grant arising from a deed

of one lot by the proprietor of both: *Janes* v. *Jenkins*, 7 Am. Law Reg. N. S. 24, s. c. 34 Md. 1 (1871), but even this is against the current of American decisions: *Keats* v. *Hugo*, 115 Mass. 216 (1874).

Vermont, also, in 1860, fully endorsed and directly applied the American rule above laid down: *Hubbard* v. *Town*, 33 Vt. 295, the court saying: "We think the English courts, in applying the doctrine of the presumption of grants from long use and acquiescence to this class of cases, clearly departed from the ancient common-law rule as laid down in *Bury* v. *Pope*, Cro. Eliz. 118, and the error, as it seems to us, consists in placing cases like the present upon the same footing and making them subject to the same rules that govern another class of cases, to which they really have no analogy. In *Lewis* v. *Price*, WILMOT, J., said "that when a house had been built forty years and has had lights at the end of it, if the owner of the adjoining ground builds against them so as to obstruct them, an action lies; and this is founded on the same reason as where these have been immemorial, for this is long enough to induce a presumption that there was originally some agreement between the parties, and that twenty years was sufficient to give a man a title in ejectment on which he may recover the house itself, and he saw no reason why it should not be sufficient to entitle him to an easement belonging to the house.' As we have already seen, no presumption of an agreement arises, as none was necessary to justify the act. The man who occupies his own house for twenty years has no better title to it at the end of that time than he had in the outset. Does he acquire any greater right to the light by the occupation than to the house? Clearly not; having usurped no right he can acquire none by lapse of time. The error in the reasoning is, in saying that because the man who takes possession of his neighbor's house and holds it adversely for twenty years (his neighbor acquiescing therein), acquires a title to it, therefore the man who opens windows in his own house, that in no way interfere with the rights of his neighbor, and of which such neighbor has no legal right to complain, and keeps them open for twenty years, thereby acquires a right to insist that no act shall be done by his neighbor on his own land that in any respect interferes with or obstructs the light to those windows. In the one case there is an infringement of the rights of another for which the law gives a remedy by action; in the other there is not. This constitutes a radical difference between the two cases, and that, too, in respect to the very point upon which the whole doctrine of presumption in cases like those under consideration depends."

The same year the Supreme Court of Ohio approved this doctrine in *Hicatt* v. *Morris*, 10 Ohio St. 530 (1860), and repeated the same in *Mullen* v. *Stricker*, 19 Ohio St. 142 (1869). Texas followed the same way in *Klein* v. *Gehrung*, 25 Tex. 238 (1860); and the next year Alabama also fully endorsed the same rule in *Ward* v. *Neal*, 37 Ala. 500 (1861); and West Virginia is also on the same side: *Powell* v. *Sims*, 5 West Va. 1 (1871); and now Indiana, in our principal case, has added the weight of a well-considered judgment in support of the same view.

Morrison v. *Marquardt*, 24 Iowa 35 (1867), sometimes cited on the same side, seems to have been decided rather against the doctrine of an implied grant of a right to light and air from a conveyance of the estate to which it is claimed as appurtenant; a very different question, but one, however, which the main current of authorities in America decide the same way as when a right is claimed merely by long use.

In opposition to this long array of express adjudication, what support has the English rule in our courts? The doctrine of a prescriptive right from

long use merely does seem to have been approved in New Jersey in *Robeson* v. *Pittenger*, 1 Green Ch. 57 (1838), but there was an additional important fact in that case, that the two adjoining lots had been both owned by the same party, and after the plaintiff's building had been erected on one, he had sold the defendant's lot to other parties, from which an implied grant, or reservation rather, has been sometimes deduced of a right to continue the lights as before. Whether there is or is not a sufficient foundation for such a claim, in the absence of express words to that effect, may well be doubted, but the claim rests on a very different basis from that of a mere presumptive adverse user. The same observation applies still more strongly to the case of *Dusel* v. *Boisblanc*, 1 La. Ann. 407 (1846).

In *Manier* v. *Myers*, 4 B. Monr. 520 (1844), Judge MARSHALL, of Kentucky, did quote approvingly, by way of illustration in a certain case, the English rule, but we do not find any express decision in that state upon the question; and Judge STORY, in *United States* v. *Appleton*, 1 Sumn. 402, apparently approves the doctrine.

In *Gerber* v. *Grabel*, 16 Ill. 217 (1854), the marginal notes would indicate that the English rule was approved, and the case is often so cited, but a careful examination of the case shows that this was not necessarily the point of the decision. The action was for wrongfully obstructing the plaintiff's light, but the declaration did not allege on *what ground* the plaintiff claimed the right, whether by presumption, express grant, or implied grant, and judgment below having been arrested, on a verdict for the plaintiff, this decision was reversed and judgment on the verdict, because, said the court, "the plaintiff might have proved a prescription under our common law, as we have laid it down, or he might have proved an express grant; or he might have proved circumstances from which a grant or estoppel would be presumed without regard to length of use. We must presume the proofs warranted the verdict, and there is nothing in the verdict contrary to law." But Judge SCATES had already said, after stating the English rule, "But such is not the rule of the common law of Illinois, as I shall proceed to show;" and he continues, "while we highly respect the learned decisions of English courts adopting an analogous rule to their statute of limitations, we must bow to the authority of these older rulings (which he had before cited as not supporting the doctrine of prescription), with liberty to say that a twenty years' prescription for the easement of light and air is not applicable to the circumstances of this state, unsettled and unimproved as it is;" and he cites with approbation *Parker* v. *Foote*, 19 Wend. 309, and other cases on the same side. We do not, therefore, understand Illinois to be in favor of the English rule. Precisely the same view was taken in *Ward* v. *Neal*, 35 Ala. 602 (1860), viz., that a general averment of the right to light might be good *as a matter of pleading*, upon demurrer, since under that allegation the right might be proved to have arisen from express grant, as well as by prescription. But when the case came again before the court upon the facts, setting up an adverse user merely, the English rule was expressly denied and the American adopted: 37 Ala. 500 (1861). And nothing in *Ray* v. *Lynes*, 10 Ala. 63 (1846), sanctions a different opinion, though it is sometimes cited as doing so.

In view of the course of our decisions on this question, we think it may be reasonably concluded that, *notwithstanding some early opinions to the contrary, it cannot now be safely asserted that the doctrine of a right to light and air by a mere prescriptive use prevails at present in a single American state.*

EDMUND H. BENNETT.

Supreme Court of Errors of the State of Connecticut.

STATE v. ANTON BANTLEY.

If one person intentionally inflicts upon another a wound, calculated to destroy life, and death ensues therefrom within a year and a day, the offence is murder or manslaughter, as the case may be; and he is none the less responsible for the result, although it may appear that the deceased might have recovered if he had taken proper care of himself, or that unskilful or improper treatment aggravated the wound and contributed to his death.

A charge of the court, claimed to be erroneous, is to be considered, not in the abstract, but with reference to the actual facts of the case.

INFORMATION for manslaughter, brought to the Superior Court in Hartford county, and tried to the jury, on the plea of not guilty. Verdict, guilty, and motion for a new trial for error in the charge of the court. The case is fully stated in the opinion.

G. G. Sill and *T. E. Steele*, in support of the motion.

W. Hamersley, State's Attorney, *contrà*.

The opinion of the court was delivered by

PARDEE, J.—On the night of June 11th 1876, the accused inflicted a severe gun-shot wound upon the arm of one March, between the elbow and shoulder; March died eleven days thereafter of lockjaw. The prosecution claimed that death resulted from the wound; the accused claimed that it resulted from the treatment of the case by the attending physicians. The wound was dressed in the first instance by one surgeon; afterwards, to the time of death, by another. These differed radically as to the manner in which the case should have been treated. The counsel for the accused claimed, and asked the court to charge the jury, that if they should find that the death of March was the result or consequence of wilful mismanagement or gross carelessness on the part of the attending surgeons, they could not find the accused guilty of manslaughter, as charged in the information. The court charged the jury that unless they should find that March died from a wound inflicted by the accused, as charged in the information, they could not convict him of manslaughter; but that if they should find that the accused wilfully and without justifiable cause inflicted on March a dangerous wound, from which death would be likely to ensue, and if they should find also that his death did in fact ensue from, and was caused by, the wound, and not from any

other cause, carelessness and mismanagement of whatever character, on the part of the attending surgeons, would be immaterial, and the treatment of the case by them, whatever it may have been, could not avail the accused as a defence.

As to the law applicable to this case, Roscoe says: "The law on this point is laid down at some length by Lord HALE. If, he says, a man give another a stroke, which, it may be, is not in itself so mortal but that with good care he might be cured, yet if he dies within the year and a day, it is a homicide or murder as the case is, and so it has been always ruled. But if the wound be not mortal, but with ill application by the party or those about him of unwholesome salves or medicines the party dies, if it clearly appears that the medicine and not the wound was the cause of the death, it seems it is not homicide; but then it must clearly and certainly appear to be so. But if a man receive a wound which is not in itself mortal, but for want of helpful applications or from neglect it turns to a gangrene or a fever, and the gangrene or fever be the immediate cause of the death, yet this is murder or manslaughter in him that gave the stroke or wound; for that wound, though it was not the immediate cause of the death, yet if it were the mediate cause, and the fever or gangrene the immediate cause, the wound was the cause of the gangrene or fever, and so consequently *causa causans*:" Roscoe's Criminal Evidence, 7th ed., 717; 1 Hale P. C. 428. In *Rex* v. *Rews*, J. Kelynge 26, it was held that neglect or disorder in the person who receives the wound will not excuse the person who gave it; that if one gives wounds to another who neglects the care of them and is disorderly and does not keep that rule which a wounded person should do, if he die, it is murder or manslaughter, according to the circumstances of the case, because if the wounds had not been given the man had not died. In *Regina* v. *Holland*, 2 Mood. & Rob. 351, the deceased had been severely cut with an iron instrument across one of his fingers, and had refused to have it amputated; and at the end of a fortnight lockjaw came on and the finger was then amputated, but too late, and the lockjaw ultimately caused death. The surgeon expressed the opinion that early amputation would probably have saved his life. MAULE, J., held that a party inflicting a wound which ultimately becomes the cause of death is guilty of murder, though life might have been preserved if the deceased had not refused to submit to a surgical operation. In *Commonwealth* v. *Pike*, 3 Cush.

181, it was held that where a surgical operation is performed in a proper manner and under circumstances which render it necessary, in the opinion of competent surgeons, upon one who has received a wound apparently mortal, and such operation is ineffectual to afford relief and save the life of the patient, or is itself the immediate cause of the death, the party inflicting the wound will nevertheless be responsible for the consequences. Greenleaf says (Greenleaf's Ev., vol. 3, sect. 139, 5th ed.), "If death ensues from a wound given in malice, but which being neglected or mismanaged the party died, this will not excuse the prisoner who gave it; but he will be held guilty of the murder unless he can make it clearly and certainly appear that the maltreatment of the wound or the medicines administered to the patient or his own misconduct and not the wound itself was the sole cause of his death, for if the wound had not been given the party had not died."

In *Rex* v. *Johnson*, 1 Lewin C. C., the deceased died from a blow received in a fight with the prisoner; a surgeon expressed an opinion that a blow on the stomach, in the state in which the deceased was, arising from passion and intoxication, was calculated to occasion death, but not so if the party had been sober. HULLOCK, B., directed an acquittal, observing that when the death was occasioned partly by a blow and partly by a predisposing circumstance it was impossible to apportion the operation of the several causes and to say with certainty that the death was immediately occasioned by any one of them in particular. Of this case, Roscoe remarks that it may be doubted how far this ruling of the learned judge was correct: Roscoe's Crim. Ev., 7th ed., 718. In *Rex* v. *Martin*, 5 Car. & P. 130, where the deceased at the time when the blow was given was in an infirm state of health, PARK, J., said to the jury, "It is said that the deceased was in a bad state of health, but that is perfectly immaterial, as, if the prisoner was so unfortunate as to accelerate her death he must answer for it." In *Commonwealth* v. *Hackett*, 2 Allen 136, it was held that one who has wilfully inflicted upon another a dangerous wound with a deadly weapon, from which death ensued, is guilty of murder or manslaughter, as the evidence may prove, although through want of due care or skill the improper treatment of the wound by surgeons may have contributed to the death.

Upon these authorities we may state the rule as follows: If one

person inflicts upon another a dangerous wound, one that is calculated to endanger and destroy life, and death ensues therefrom within a year and a day, it is sufficient proof of the offence either of manslaughter or murder, as the case may be; and he is none the less responsible for the result, although it may appear that the deceased might have recovered if he had taken proper care of himself, or that unskilful or improper treatment aggravated the wound and contributed to his death.

There is no such defect in the law as that the person who intentionally inflicts a wound calculated to destroy life, and from which death ensues, can throw responsibility for the act upon either the carelessness or the ignorance of his victim; or shield himself behind the doubt which disagreeing doctors may raise as to the treatment proper for the case. Indeed, counsel for the defendant do not really deny the force of the rule. Their complaint is rather in the nature of a verbal criticism of the charge. The judge said to the jury that if the death of March resulted from the wound and from no other cause, carelessness and mismanagement of whatever character on the part of the attending surgeon, would be immaterial. It is to be presumed in favor of a charge that it refers to matters concerning which witnesses have testified and to points concerning which counsel have presented argument, and it is not to be presumed that it includes within its scope all possibilities. From this record we cannot perceive that any witness suggested even that the attending surgeons caused the death of March by an intentional misapplication or withholding of remedies, or that counsel in argument intimated any such thing. The motion states that the two doctors differed radically regarding the treatment proper for the case: the claim of each as to the other was that he had erred through ignorance, not by criminal intention; and when the judge used the expression complained of in this case we are to presume that he referred, and that the jury understood him to refer, to that kind of mismanagement alone of which witnesses had testified and concerning which counsel had argued in their hearing. With this limitation, the defendant has no occasion for complaint.

A new trial is not advised.

Supreme Court Commission of Ohio.

EDWARD SHINDELBECK *v.* SIMON P. MOON ET AL.

A landlord who has demised property, parting with possession and control thereof to a tenant in occupation, is not responsible for injuries arising from defective condition of such premises, when that defect arises during the continuance of the lease.

Upon leased premises, a water-pipe and gutter, not defective in their original construction, became stopped up, so that water flowed upon the door-steps of the leased house, forming ice, upon which plaintiff fell and was injured. As between lessor and lessee, in the absence of contract to the contrary, it is the duty of the latter to repair the pipe or remove the ice, and for failure in this he is liable, and not the landlord.

If the defective condition of leased premises occasions damage, in order to make the lessor or landlord responsible, it is not sufficient merely to allege ownership in him, but the special circumstances creating his liability must be averred.

ERROR to the District Court of Defiance county. On demurrer to petition, which set out that defendant Moon was the owner and defendant Francis Brooks the lessee, and possessed of certain premises situate in said county, to wit, &c.; that said Brooks was then using and kept said premises as the post office of said village; that said defendant Moon, prior to his demise of the said premises to said Brooks, had erected and attached to the building situate thereon, a part of which building was so used as a post office, a conductor or water-pipe leading from the roof thereof to the sidewalk of said street, and that the water brought down and running through said pipe from the said roof, was discharged upon the sidewalk of said street, close by the steps and door leading therefrom into said post office, and that at and prior to the time of said injuries the said defendant had suffered the gutter attached to said roof to become filled and obstructed and the water to fall directly from said roof upon said steps and sidewalk around the same; that said defendants and each of them had carelessly, negligently and wrongfully, on and prior to the 21st day of December, A. D. 1872, suffered the water which had so fallen from said roof upon said steps and walk, and which had so been discharged from said conductor around said steps, to become and remain frozen unevenly, and in ridges on said steps and walk around the same, and by reason of the premises, said defendants had then knowingly suffered said steps and walk to become unsafe to persons passing thereon; and that plaintiff, without fault or negligence on his part and while lawfully passing from said post office

over said steps to and upon said sidewalk, by reason of the premises, unavoidably slipped upon said steps and fell upon said sidewalk, whereby the left ankle of him, the said plaintiff, was then and there broken, &c.

In the Court of Common Pleas this demurrer was overruled and the cause proceeded to trial, resulting in favor of the plaintiff below, now plaintiff in error, but the District Court reversed the judgment, holding that the petition stated no cause of action.

Henry Newbegin, for plaintiff in error.

T. W. Sutphen, for defendant in error.

The opinion of the court was delivered by

WRIGHT, J.—The petition and demurrer involve questions relating to the liability of landlord and tenant, lessor and lessee, where a third person has been injured in consequence of some defect in condition of the premises. Moon was the owner of certain property in the village of Defiance, which he had leased to Brooks, who was in possession of and using the same for a post office. A pipe or gutter attached to the building had become obstructed or stopped up, and the water, instead of running through it, flowed over the roof. This water falling upon the steps of the post office in winter, ice was formed. Coming from the post office plaintiff slipped upon this ice, fell, and was hurt.

Moon, the landlord, and Brooks, the tenant, were both sued. Brooks was dismissed from the action, and the question to be decided is, is Moon, the landlord, liable upon the statements made in the petition?

The liabilities arising from the relation of landlord and tenant are these: liability generally accompanies occupation, and when a landlord leases and parts with the possession, his liabilities are in certain instances devolved upon the tenant. The principle which runs through cases, determining the responsibility of the one or the other, may be thus defined. Whoever had control of the premises at the time the cause of the injury originated, that person is liable in damages, which simply means that the party in fault must respond. Hence it is that where, at the time of the lease, the property is in a ruinous or defective condition, and by reason thereof the injury happens, then the owner or lessor is liable, generally; though there are cases which make this liability dependent upon

the covenants of the lease. And upon the other hand, when this defective condition arose after the lease, then the tenant is responsible, with perhaps exceptions upon covenants. And when there has been a nuisance of continued existence, lessor and lessee may both be liable for damages resulting therefrom. The lessee in actual possession of the premises, if he continues the nuisance after notice of its existence and notice to abate it, and the lessor if he at first created it and demised the premises with the nuisance upon them, and at the time of the damage done is receiving a benefit therefrom by way of rent or otherwise.

In *Roswell* v. *Prior*, 12 Mod. 635, it is held that if an owner erect a nuisance for which damages are recovered, and the nuisance is continued in the hands of his lessee, an action for the continuance of it may be against either. Here the nuisance or original trouble was occasioned by the owner, and he is held responsible even after the lease. The court says that both may be liable, the landlord for originating and the tenant for continuing. It is said in the case that the erector of the nuisance cannot discharge himself by assigning over, and more especially when he grants over, reserving rent, by which he continues the nuisance, having a recompense for it in such rent.

This case illustrates the idea that control is the criterion of responsibility, for control means that power which *occasions* and which can *prevent*. The nuisance was erected, that is, originated by the owner, who manifestly, therefore, should be responsible for its consequences. But it will be observed that not only the owner, but the tenant also is held liable, upon the ground that every continuance of a nuisance is a fresh nuisance: Taylor Land. & Ten., sec. 175; *Vedder* v. *Vedder*, 1 Den. 257; *Little Miami Railroad Co.* v. *Commissioners of Green County*, 30 Ohio St. (not yet reported). This fresh nuisance the tenant might abate if he saw fit, being in control of the premises, and for failure in this he is responsible.

In *Todd* v. *Flight*, 9 Com. B. (N. S.) 377 (9 J. Scott N. S.), there was a demurrer to a declaration. Defendant leased to a tenant a lot, in which stood a stack of old chimneys, in a ruinous and dangerous condition, at the time of the lease, and defendant knew it and so maintained them. The chimneys fell on plaintiff's house, and defendant was held liable on the declaration. ERLE, J., says, 390: "It is alleged that the defendant let the houses when the

chimneys were known by him to be ruinous and in danger of falling, and that he kept and maintained them in this state, and thus he was guilty of the wrongful non-repair which led to the damage, and after the demise the fall appears to have arisen from no fault of the lessee, but by the laws of nature." The owner of premises who leases them when they are in such want of repair or bad condition as to be a nuisance, or when, from the ordinary course of events, they must become so, and receives rent for their use, is liable to a third person for injury happening in consequence of this defective condition or nuisance. In such case the landlord had the control of the property at the time the trouble was occasioned, and he might have removed it. It is the party who does the wrong who should be made responsible for the consequences it entails. But if the nuisance arises solely from the act of the tenant, the landlord cannot be held: *Owing* v. *Jones*, 9 Md. 108; *Staple* v. *Spring*, 10 Mass. 79; *Waggoner* v. *Jermaine*, 3 Denio 306; *Fish* v. *Dodge*, 4 Id. 311; *House* v. *Metcalf*, 27 Conn. 632; *Smith* v. *Elliot*, 9 Barr 345.

Rich v. *Basterfield*, 4 Com. B. 783, was a case much discussed, and decided for plaintiff at Nisi Prius, but unanimously reversed in full court. The owner of a house, standing back from the street, built a low shop between his house and the street, with a chimney, and rented out the shop. The tenant used the chimney for a fire, and when the wind was from the east, or south-east, smoke was blown into plaintiff's windows, causing him great annoyance. Defendant, the owner, was sued on the ground that he built the chimney which made the nuisance, and was answerable for the ordinary use of it. The court held that the chimney itself was not a nuisance, but it was the fire made by the tenant; that coke might have been used, or he might have abstained from having a fire when the wind was in the wrong direction, and the owner therefore was not liable. He had no control of the fire.

Upon the other hand, in *House* v. *Metcalf*, 27 Conn. 632, an owner had leased a mill situated so near the highway that its revolving wheel frightened horses. The owner was held responsible, although it would seem that not the mill itself, but its operation in the hands of the tenant, occasioned the difficulty.

Gandy v. *Jubber*, 5 B. & S. 485, a grate over the sidewalk long there, had the bars so wide apart that a woman slipped her foot through and lamed herself. The premises were rented at the time

from year to year, and the landlord, the heir of the original owner and builder, was held liable on the ground that the grate was a nuisance in its original construction. Declaration avers that the tenant "was *not* under obligation to alter, repair or keep in repair," and that it had been years so that one might fall through. The jury found that the grate was a nuisance, both from the faultiness of its construction and from want of repair. CROMPTON, J., says, "it must be a nuisance in its very *nature* and essence at the time of the letting, and not merely something which is capable of thereafter being rendered a nuisance by the tenant." BLACKBURN says, "the nuisance must be a normal one." This case was reversed in the Exchequer, 9 B. & S. 15. It is, however, there said that "to bring liability home to the owner, the premises being let the nuisance must be one which was in its very nature and essence a nuisance at the time of letting, and not something which was capable of being thereafter rendered a nuisance by the tenant, and that it is a sound principle of the law that the owner of property receiving rent should be liable for a nuisance existing in his premises at the date of the demise." And the judgment of the Queen's Bench is reversed on the ground that, "it is not averred either directly or by any reasonable inference that the grating was defective at the time of letting." Wharton on Neg., sect. 817, says: "An owner being out of possession and not bound to repair, is not liable in this action for injuries in consequence of his neglect to repair. But where the nuisance existed when the property was leased to the tenant, the landlord may be held liable; so the tenant is liable for the nuisance thus retained by him, even though the nuisance was on the premises when leased to him. And both landlord and tenant under the circumstances are jointly and severally liable for the continuance of the nuisance, supposing the nuisance to be on the property when leased, or to be put there with the landlord's connivance."

The City of Lowell v. *Spalding*, 4 Cush. 277, was case for damage to plaintiff by falling into a space left open in the sidewalk, where it was held that the occupant and not the landlord is bound, as between himself and the public, so far to keep the buildings in repair, that they will be safe for the public, and such occupant is, *prima facie*, liable to third persons for damages arising from any defect. If there is an express contract that the landlord shall repair, suit will be sustained against him to avoid circuity of action.

The occupier is *prima facie* liable and the owner is not, merely as owner without fault on his part: *Russell* v. *Shenton*, 3 A. & E. N. S. 449.

There is another large class of cases that would seem to be not entirely in accordance with the view that has been advanced, though perhaps the difference is more in appearance than reality. There are cases where the liability is devolved in accordance with the covenants of the lease and made to accompany the duties it imposes. If the defect existed prior to the lease, and by its provisions the tenant assumes the responsibility of keeping the premises in repair, it has been held that the landlord was not responsible. In the early case of *Payne* v. *Rogers*, 2 H. Blk. 350, the head-note is, "if the owner of a house is bound to repair it, he and not the occupier is liable to an action on the case for an injury sustained by a stranger, from a want of repairs."

This was an action against the owner of a house in the occupation of a tenant. It does not seem to have been made a point in the case, whether the defect arose before or after the demise, a question important, as we have seen, in cases not involving the element of covenants in the lease. The case is made wholly to turn upon the agreement as to repairs between the landlord and the tenant. And the landlord, having bound himself to the tenant to repair, is made liable for the injury. Although nothing is said in the case about who had control of the premises, and though the facts do not show in whom that control was when the defect occasioning the injury originated, still it may be perhaps fairly said that by binding himself to repair, the owner retained such control as would enable him to make those repairs. This view is sustained by the language of the court in *Burdick* v. *Cheadle*, 26 Ohio St. 393: "But in case a landlord undertakes with his tenant to keep the premises in repair, having thus reserved the control to the extent necessary for making repairs, his duty to the public in relation to the property is not affected by the lease, and he remains responsible under the doctrine of the above maxim (*sic utere*, &c.), for defects arising from the want of repairs during the continuance of the lease."

In the case of *Pretty* v. *Bickmore*, Law Rep. 8 C. P. 401, the tenant had covenanted to repair. The premises were dangerous at the time of the demise. But it was held that the landlord was not liable because of the tenant's covenant. This case is disapproved of in *Swords* v. *Edgar*, 59 N. Y. 28, although it is followed up by

the case of *Gwinnell* v. *Eamer*, Law Rep. 10 C. P. 658. See also *Leonard* v. *Storer*, 115 Mass. 86; *Shipley* v. *Fifty Associates*, 106 Id. 194; 101 Id. 251; Shearman & Redfield on Neg., sects. 501, 502; *Whaler* v. *Gloucester*, 11 Hun 24, s. 99; *Nelson* v. *Liverpool Brewery Company*, Law Rep. 2 C. P. Div. 311.

It is not necessary, however, nor do we undertake to decide as to any of the rights or liabilities, which subsist by reason of the covenants of leases. What the terms of the letting in this case are, we have no means of knowing, nor are we advised whether the landlord or tenant undertook to repair. The remarks made apply only to such cases as involve no consideration of the agreement by which the demise was made, other than the mere fact of its existence. The lessor is not liable to a stranger for an injury arising out of the property being out of repair, unless under special circumstances, such as a covenant with the lessee to make the repairs: *Bears* v. *Ambler*, 9 Barr 193.

If the owner as distinct from the occupier is sued for damages arising from a falling wall, a special ground of liability must be averred, other than mere ownership. The public looks to the occupier, not to the estate: *Chauntler* v. *Robison*, 4 Exch. 163.

"Where property is demised and at the time of the demise is not a nuisance and becomes so *only* by the act of the tenant while in his possession, and injury happen during such possession, the owner is not liable." "But where the owner leases premises, which are a nuisance or must in the nature of things become so by their user, and receives rent, then whether in or out of possession he is liable for injuries resulting from such nuisance:" *Owings* v. *Jones*, 9 Md. 108; *Fisk* v. *Dodge*, 4 Denio 311; *Hadley* v. *Taylor*, Law Rep. 1 C. P. 53; *Fisk* v. *Framingham Mem. Co.*, 14 Pick. 491; *Chatham* v. *Hampsin*, 4 T. R. 318; *Morton* v. *Wiswell*, 26 Barb. 618.

A well-considered case upon this subject is found in *Swords* v. *Edgar*, 59 N. Y. 28. Defendants were owners of a pier, which was under lease. A laborer engaged in discharging the cargo of a steamer was injured by reason of the pier falling, through rottenness of its timbers. The defect existed at the time the lease was made. It is held, that ordinarily it is the duty of the occupant to see that the premises are secure, but where they are leased and at the time of the demise and delivery of possession to the lessee they are in a defective and unsafe condition, and in consequence, thereafter, while in possession of the lessee an injury happens, the

lessor, who is receiving a benefit by way of rent or otherwise, is liable. And the owner or lessor was held responsible. In this case, as in many others that might be cited, we find the same principle and it is thus stated in *Fisher* v. *Therhill*, 21 Mich. 1: "a party will not be liable for an injury occasioned by a nuisance on the ground of his possession of the premises where the nuisance is shown to exist, unless his possession be such as to give him the legal control of the premises."

This was the case of a person injured by falling through a coal hole in the sidewalk, and the question was whether the landlord or tenant was liable. When a landlord has leased premises he parts with control of them; with possession that control passes to the tenant, and if a defect arises, or want of repair, or the premises are allowed to get into such a condition as that they become dangerous during the demise, it is the duty of the tenant to take such steps as will prevent injury.

The liability arising from the control of premises is illustrated in that large class of cases where contractors build houses. If the premises are completely given up to the contractor, he will be responsible to one injured during the progress of the work. If on the other hand the owner retains supervision, and the building goes on under his direction, as he is in control of the premises his responsibility continues; the contractor or builder then stands to him in the relation of servant. And there are many nice cases as to whether the party is an independent contractor or servant merely. It is, however, not necessary to enter into this discussion; the principle of control and its accompanying liability is sufficiently illustrated in *City of Cincinnati* v. *Stone*, 5 Ohio St. 38. The city contracted with B. to grade a street, in doing which he blocked the water so that it flowed over Stone's ground, doing damage. The city was held liable on the ground that by the contract she reserved the right to direct the manner of doing the work. The syllabus says, that where the employer retains control and direction of the work, and injury happens, he will be responsible: *Clark* v. *Fry*, 8 Ohio St. 358; *Gwathney* v. *Little Miami Railroad Co.*, 12 Id. 92. The principle suggested is recognised in *Burdick* v. *Cheadle*, 26 Ohio St. 393. In that case the person injured was in the store upon the invitation of the tenant, or as a customer, and was not a stranger, maintaining his rights as one of the public. It is held, that if one invites another into danger and hurt, the sufferer

must seek his remedy against the party inviting him. That he cannot maintain an action against another, is apparent from the fact, that if he had not accepted the invitation, he would not have been injured.

In *Burdick* v. *Cheadle*, the court in discussing the maxim "*sic utere*, &c.," observes, "The principle ordinarily applies only to persons in possession and having control of the property either as owners or tenants."

The rule therefore deducible from the authorities, and which is applicable to the case in hand, is this—a landlord who is out of possession of the premises by virtue of a demise, and who has no control over them, who would not have the right to enter therein even to make repairs, without his tenant's consent, is not liable for accidents occasioned by the fact that the property is temporarily out of repair. If the defect is inherent in the original construction, and this occasions the injury, then the landlord or lessor is responsible, but when the defect arises after the lease, then the tenant is responsible.

Examining the amended petition, therefore, we find this alleged: Moon was the owner and Brooks the lessee, and possessed of the premises, using and keeping them as a post office. It is then averred that the water-pipe or gutter became filled and obstructed, and the water fell from the roof upon the steps leading from the post office to the sidewalk. This froze and the plaintiff slipped on the steps and fell. The cause of the injury is the stopping up of the pipe. It is not alleged that there was a fault in its original construction, but it would appear to be one of those obstructions that may occur at any moment. It is not averred that this obstruction existed before the demise was made, and such an averment is necessary before the landlord can be held. If it occurred after the demise, it is the duty of the tenant or occupier to see that such obstruction was removed. The petition, therefore, lacks the necessary averments to show that the landlord is liable, as it does not show a defect when the premises were in his control before he leased, and for which alone he is responsible. All facts necessary to raise a legal liability must be strictly averred: *Metcalf* v. *Hetherington*, 11 Exch. 257.

And again, it was the ice that occasioned the accident. It is not averred that it was the duty of the landlord to remove this ice, nor does it appear that he had such control of the premises as called

upon him to do it. If this ice was a nuisance to the passing public, endangering their lives and limbs, it was a nuisance arising during the continuance of the lease. It was a thing temporary in its nature, a defective condition of things, such as the tenant was called upon to remedy, and not the landlord, as between landlord and tenant. Judgment affirmed.

Court of Appeals of Texas.

CHARLES FRASHER *v.* THE STATE OF TEXAS.

Marriage is not a contract protected by the constitution of the United States or any of its amendments. It is a civil status under the control of the states, and the existence of the relation and the rights, obligations and duties arising out of it are to be determined exclusively by state laws.

The provision of the Texas code making marriage of a white person to a negro an indictable offence is not repugnant to or avoided by the fourteenth and fifteenth amendments to the constitution of the United States, or the legislation of Congress under them.

The fact that by the code the penalty is imposed on the white person only, does not make it obnoxious to the Civil Rights Bill.

APPEAL from the District Court of Gregg county. The indictment in this case charged that on March 18th 1875, in the county and state aforesaid, the defendant, being then and there a white man, did then and there unlawfully, knowingly and feloniously, marry a negro, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state.

The indictment was based upon article 2016 of the Criminal Code (P. D.), which is as follows: "If any white person shall, within this state, knowingly marry a negro, or a person of mixed blood, descended from negro ancestry to the third generation inclusive, though one ancestor of each generation may have been a white person, or having so married, in or out of the state, shall continue within this state to cohabit with such negro, or such descendant of a negro, he or she shall be punished by confinement in the penitentiary not less than two nor more than five years."

The defendant was tried at the July Term 1877, of the District Court of Gregg county, and convicted, and his punishment assessed at four years' confinement in the penitentiary.

The opinion of the court was delivered by

ECTOR, P. J.—The counsel for the defendant insists that the Act of 1858, under which this prosecution was had, is in conflict

with the fourteenth and fifteenth amendments of the constitution of the United States and the first section of the Civil Rights Bill; that the statute prohibiting such marriages was passed in the interest of slavery, before that institution was abolished, and when the negro was not a citizen of the United States, and that it cannot be enforced, because it prescribes a penalty to be inflicted upon the white person alone.

The first question, then, presented for the consideration of this court, is whether the positions assumed, as above stated, by the defendant's counsel, or any one of them, are correct. We are not unmindful of the questions involved, and have given them our most careful and thoughtful consideration. No question more important in its consequences, or more profoundly interesting to the people of this country, has ever been before this court.

It is evident that the fifteenth amendment has no application or bearing whatever upon the question at issue. The fourteenth amendment contains four separate and distinct propositions:—

1. It confers the right of citizenship upon all persons born or naturalized in the United States, and who are subject to the jurisdiction thereof.

2. It declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

3. It prohibits any state from depriving any citizen of life, liberty or property without due process of law.

4. It provides that no state shall deny to any person within its jurisdiction the equal protection of the law.

In placing a construction upon a constitution, or any clause or a part thereof, a court should look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief and the remedy. The court should also look to the nature and objects of the particular powers, duties and rights in question, with all the lights and aids of cotemporary history, and to give to the words of each provision just such operation and force, consistent with their legitimate meaning, as will fairly secure the end proposed: *Kendall* v. *United States*, 12 Peters 524; *Prigg* v. *Commonwealth*, 16 Id. 539.

In the *Slaughter House Cases*, the Supreme Court of the United States, in referring to the thirteenth, fourteenth and fifteenth

amendments of the constitution, say: "An examination of the history of the causes which led to the adoption of these amendments, and of the amendments themselves, demonstrates that the main purpose of all the last three amendments was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppression of the white men who had formerly held them in slavery. In giving construction to any of these articles, it is necessary to keep this main purpose in view, though the letter and spirit of those articles must apply to cases coming within their purview, whether the party concerned be of African descent or not."

We will now proceed briefly to construe the first section of the fourteenth amendment. The first clause of this amendment reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." This clause declares and determines who are citizens of the United States and how their citizenship is created. Before its enactment there had been much diversity of opinion among jurists and statesmen, whether there was any citizenship independent of that of state citizenship, and, if any existed, as to the manner in which it originated. To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship, and to declare what should constitute citizenship of the United States, and also citizenship of a state, the first clause of the first section was framed. It clearly recognises the distinction between citizenship of the United States and citizenship of a state. A person must reside within a state to make him a citizen of it. He must be born or naturalized in the United States to be a citizen of the union. The Supreme Court of the United States, in construing this clause, say, "that its main purpose was to establish the citizenship of the negro, can admit of no doubt." The phrase, "subject to its jurisdiction," was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States: 16 Wall. 36.

The language of the second clause of the section under consideration is, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The first mention of the words "privileges or immunities," is found in the fourth of the articles of the old confederation.

In the constitution of the United States, which superseded the articles of confederation, we find in section two of the fourth article the following words: "The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states." This clause of the constitution has been construed. The first and leading case on this subject is that of *Corfield* v. *Coryell*, decided by Justice WASHINGTON, in the Circuit Court for the district of Pennsylvania in 1824. "The inquiry," he says, is, "what are the privileges and immunities of citizens of the several states? We find no hesitancy in confining these expressions to those privileges and immunities which are fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this union, from the time of their becoming free, independent and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: Protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may generally prescribe for the general good of the whole:" 4 Wash. C. C. 380.

This definition of the privileges and immunities of the citizens of the states is adopted in the main by the Supreme Court of the United States in the case of *Ward* v. *The State of Maryland*, 12 Wall. 430. See also case of *Paul* v. *Virginia*, 8 Id. 180.

This clause, under consideration, did not profess to control the power of the state governments over the rights of their own citizens. Its intent and purpose were to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of other states within your jurisdiction. It was never the purpose of the fourteenth amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States, to transfer the security and protection of all the civil rights embraced within the entire dominion of privileges and immunities of citizens of the states, from the states to the federal government: *Crandall* v. *Nevada*, 6 Wall. 36.

It may be said that the cases cited were decided before the pass-

age of the fourteenth amendment to the federal constitution. The Supreme Court of the United States, after the passage of the fourteenth amendment, have had occasion to construe this clause. The following extract is taken from the opinion of the court: "Was it the purpose of the fourteenth amendment by the simple declaration that no state shall make or enforce any law which shall abridge the *privileges or immunities of citizens* of the United States, to transfer the security and protection of all the civil rights which we have mentioned from the states to the federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the state?".

"All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever, in its discretion, any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the states in their most ordinary and useful functions, as in its judgment it may think proper on all such subjects. And still further, such a construction, followed by the reversal of the judgment of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment.

"The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of the instrument. But when, as in the case before us, the consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions, when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them, of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the state and federal governments to each other and of both of these governments to the people, the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of

doubt." "We are convinced that no such results were intended by the Congress which proposed those amendments nor by the legislatures of the states which ratified them:" 16 Wall. 36.

Again, in the case of *Minor* v. *Happersett*, the same court held, "that the fourteenth amendment of the constitution of the United States does not add to the 'privileges or immunities' of citizens, but only furnishes additional protection for the privileges, &c., already existing:" 21 Wall. 162.

The third clause of the section is as follows: "Nor shall any state deprive any person of life, liberty or property, without due process of law." "Due process of law" is the application of the law as it exists in the fair and regular course of administrative procedure.

The fourth clause of the fourteenth amendment is: "Nor shall any state deny to any person within its jurisdiction the equal protection of the law." This clause was added in the abundance of caution, for it provides, in express terms, what was the fair, logical and just implication from what had preceded it, and that was, that persons made citizens by the amendment, should be protected by the laws in the same manner, and to the same extent, that white citizens were protected.

In the *Slaughter House Cases*, 16 Wall. 36, the Supreme Court of the United States say: "We doubt very much whether any action of a state, not directed by way of discrimination against the negro as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race, and that emergency, that a strong case would be necessary for its application to any other."

It is urged that the Civil Rights Bill has abrogated the section of our statute under which the indictment in this cause was found. The first section of the Civil Rights Bill is in these words: "That all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and that such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every state and territory of the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property,

and to have the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white persons, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding."

The first section of the act known as the Civil Rights Bill, confers upon persons of the African race power to make and enforce contracts. The power, as conferred in the first part of the section, is without limitation, but, in the latter part of the section, it is expressly restricted and qualified by the plain declaration that the rights conferred shall be enjoyed in the same manner and to the same extent "as is enjoyed by white persons."

It therefore becomes necessary to inquire whether Congress possesses the power under the federal constitution to pass a law regulating and controlling the institution of marriage in the several states of the union.

Mr. Justice NELSON, in delivering the opinion of the Supreme Court of the United States in the case of *The Collector* v. *Day*, 11 Wall. 113, says: "It is a familiar rule of construction of the constitution of the union that the sovereign powers vested in the state governments by their respective constitutions remain unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: 'The powers not delegated to the United States are reserved to the states respectively, or to the people.' The government of the United States can therefore claim no powers which are not granted to it by the constitution, and the powers actually granted to it must be such as are expressly given, or given by necessary implication. The general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former, in its appropriate sphere, is supreme, but the states, within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government, in its sphere, is independent of the states."

To the same purport are *Fifield* v. *Close*, 15 Mich. 505; *State*

v. *Garten*, 32 Ind. 1; *State* v. *Gibson*, 36 Id. 389; *People* v. *Brady*, 40 Cal. 198; *Lane County* v. *Oregon*, 7 Wall. 76; *United States* v. *Cruikshank et al.*, 2 Otto 542; *Bradwell* v. *The State*, 16 Wall. 130; *Gibbons* v. *Ogden*, 9 Wheat. 203.

Within this class, which is not granted or secured by the federal constitution, but left to the exclusive protection of the states, is that immense class of legislation mentioned by Chief Justice MARSHALL, in *Gibbons* v. *Ogden*, 9 Wheat. 203, which embraces everything within the territory of a state not surrendered to the general government, and which is necessary in the regulation of the police, morals, health, internal commerce and general prosperity of a community, and which is justly subject to state regulation. See also *Commonwealth* v. *Kemball*, 24 Pick. 350.

Mr. Justice STORY, in *Prigg* v. *Commonwealth*, 16 Peters 539, says: "To guard, however, against possible misconstruction of our views, it is proper to state that we are by no means to be understood in any manner whatever to doubt or interfere with the police power belonging to the states in virtue of their general sovereignty; that the police power extends over all subjects within the territorial limits of the states, and has never been conceded to the United States."

The police power of the states is very ably discussed by the Supreme Court of the United States in the case of *The City of New York* v. *Miln*, 11 Peters 139. In this last case cited the court say, "that all those powers which relate to merely municipal legislation, or what may more properly be called internal police, are not thus surrendered or restrained; and that consequently, in relation to these, the authority of a state is complete, unqualified and exclusive."

Mr. Justice BUSKIRK, of the Supreme Court of Indiana, has so ably discussed this question in an opinion delivered by him that, at the expense of being tedious, we will copy a portion of what he has said, fully endorsing the same. He says: "There can be no doubt that Congress possesses the power to determine who may or may not make contracts, and prescribe the manner of their enforcement, in the District of Columbia, and in all other places where the federal government has exclusive jurisdiction; but we deny the power and authority of Congress to determine who shall make contracts or the manner of enforcing them in the several states. Nor is there any doubt that Congress may provide for the punishment

of those who violate the laws of Congress; but we deny the power of Congress to regulate, control, or in any manner to interfere with the states in determining what shall constitute crimes against the laws of the state, or the manner or extent of punishment of persons charged and convicted with the violation of the criminal laws of a sovereign state. In this state marriage is treated as a civil contract, but it is more than a civil contract. It is a public institution, established by God himself, is recognised in all christian and civilized nations, and is essential to the peace, happiness and well-being of society. In fact, society could not exist without the institution of marriage, for upon it all the social and domestic relations are based. The right, in the states, to regulate and control, to guard, protect and preserve this God-given, civilizing and christianizing institution, is of inestimable importance, and cannot be surrendered nor can the states suffer or permit any interference therewith. If the federal government can determine who may marry in a state, there is no limit to its power. It can determine the rights, duties and obligations of husband and wife, parent and child, guardian and ward. It may pass laws regulating the granting of divorces. It may assume, exercise and absorb all the powers of a local and domestic character. This would result in the destruction of the states:" *The State* v. *Gibson*, 36 Ind. 389.

Mr. Bishop, in his work on Marriage and Divorce, vol. 1, 4th ed., sect. 87, says: "All our marriage and divorce laws, and of course all statutes on the subject, so far as they pertain to localities embraced within the territorial limits of the particular states, are state laws and state statutes; the national power with us not having legislative or judicial cognizance of the matter within their localities."

Marriage is not a contract protected by the constitution of the United States, or within the meaning of the Civil Rights Bill. Marriage is more than a contract within the meaning of the act. It is a civil status left solely by the constitution and the laws to the discretion of the states under their general power to regulate their domestic affairs. The rights, obligations and duties arising from it are not left to be regulated by the agreement of the parties, but are matters of municipal regulation, over which the parties have no control.

The Supreme Court of North Carolina, *The State* v. *Kennedy*, 76 N. C. 251, says: "There can be no doubt of the power of every country to make laws regulating the marriage of its subjects, to

declare whom they may marry, and the consequences of their marrying." It is clear to our mind that neither the fourteenth amendment nor the Civil Rights Bill has abrogated article 2016 of our criminal code.

Again, the counsel for the defendant insists that because the statute, under which the indictment was found in this case, fixes a penalty upon the white person alone, and none upon the negro, that it, therefore, violates the fourteenth and fifteenth amendments of the constitution of the United States and the fourth section of the Civil Rights Bill. It is conceded by him that if the statute upon which this prosecution is based punished both the white person and the negro alike it would not be obnoxious to the objections he urges against it, but would be constitutional, and clearly within the legislative powers of the state. It is, then, conceded that the states can prohibit the intermarriage of the races, and it therefore follows, as the night follows the day, that this state can enforce such laws as she may deem best in regard to the intermarriage of whites and negroes in Texas, provided the punishment for its violation is not cruel or unusual. If she cannot, what is to prevent it? The objection to our statute that it does not punish both parties alike should be addressed to the legislative and not to the judicial branch of the government. Can it be truly said that the law is illegal because the race sought to be protected by the amendments and the Civil Rights Bill is not punished?

Civilized society has the power of self-preservation, and marriage being the foundation of such society, most of the states in which the negro forms an element of any note have enacted laws inhibiting the intermarriage between the white and black races; and the courts, as a general rule, have sustained the constitutionality of such statutes. We are aware that the Supreme Court of Alabama has held that a statute of that state, which prohibited the intermarriage of whites and negroes, was abrogated by the fourteenth amendment to the federal constitution; but this opinion is not supported by reason or authorities: *Burns* v. *State*, 48 Ala. 195.[1]

Has the law of this state, passed in 1858, making it a felony for a white person to marry a negro, been repealed? We think not. Implied repeals are not favored; nothing but a statute will repeal

[1] This case has since been explicitly overruled by the Supreme Court of Alabama in *Green* v. *The State*, at the December Term 1877, not yet reported.—Ed. Am. Law Reg.

a statute: Sedgwick on Stat. and Const. Law 96, 105. During the period since the negroes were emancipated the law-making power of Texas has not only failed to repeal article 2016, but the legislature of 1866 (ch. 128, p. 131), in repealing laws "relating to slaves and free persons of color," expressly "provided, nevertheless, that nothing herein shall be so construed as to repeal any law prohibiting the intermarriage of the white and black races." The constitution of 1869 (ch. 12, sec. 27) legalized the marriage of those who had been living together as husband and wife, *and both of whom, by the law of bondage*, were precluded from the rites of marriage; but this only applied to negroes. See *Clements* v. *Crawford*, 42 Texas 601.

It has always been the policy of this state to maintain separate marital relations between the whites and the blacks. It is useless for us to cite the different statutes on this subject, enacted from time to time, showing that the people of Texas are now, and have ever been, opposed to the intermixture of these races. Under the police power possessed by the states, they undoubtedly, in our judgment, have the power to pass such laws. If the people of other states desire to have an intermixture of the white and black races, they have the right to adopt such a policy. When the legislature of this state shall declare such a policy by positive enactment we will enforce it; until this is done we will not give such a policy our sanction.

The defendant moved the court to quash the indictment, because the same does not charge any offence known to the law, and because it does not allege that said party married a negro within the third generation inclusive. The court properly overruled defendant's motion to quash. By recurring to article 2016 of our Criminal Code, it will be seen that it is made a felony for any white person in this state to knowingly marry a negro, or a person of mixed blood, descended from negro ancestry, to the third generation inclusive, &c. In this case the indictment charges that the defendant was a white person, and that he knowingly married a negro.

The defendant also filed a motion in arrest of judgment. The fifth ground set out in the motion in arrest of judgment is as follows: "Because the bill fails to charge the name of the woman, or negro, that defendant is charged to have married." We think the failure to describe the party by name that defendant married should have been taken advantage of by motion to quash and not

in arrest and that the verdict cured the omission. The offence being charged in the terms of the statute (to the disjunctive "or"), the indictment is good, on general exception. Had the exception been taken before the trial, it should have been sustained. A motion in arrest of judgment reaches substantial defects only: Pas. Dig., art. 3143. There are only three grounds of exception to the substance of an indictment in the Code, and the above is not one of them: Pas. Dig., art. 2954. Exceptions to matters not of substance must be taken before the trial by motion to quash, not by motion in arrest: *Terrel* v. *The State*, 41 Tex. 464; *State* v. *Williams*, 43 Id. 502; 1 Court of App., *Hancock* v. *The State*, Id. 357; *Long* v. *The State*, Id. 466. The certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offence: Pas. Dig., art. 2865. Had the name been given the state would have been held to prove it as alleged; but, if not given, and no motion to quash on this account, then, in a subsequent prosecution, the defendant, under a plea of *autre fois convict* or *acquit*, could introduce evidence *aliunde* to identify the transaction: *Cook* v. *Bumly*, 45 Tex. 97. An indictment might be so framed by the pleader, in cases like this, as to meet the proof on trial by having two counts in it. The first count charging that the defendant married a negro, and the second count charging that he married a person of mixed blood descended from a negro within the third generation, inclusive, from said negro.

The District Court properly admitted in evidence the marriage certificate, with the return thereon of the minister who performed the marriage ceremony. The state did not rely, however, upon this marriage certificate alone to prove the marriage, but submitted to the jury the testimony of a person who was present and witnessed the marriage. The evidence shows that the defendant was married to one Mrs. Lettice Howell, in the county of Gregg, about the time charged in the indictment. The first witness introduced by the state "described Lettice Howell as having kinky hair, a flat nose, thick lips, of gingerbread complexion, nearly black, and that she was known by everybody as a negro." Upon cross-examination the witness said "he thought *she had white blood in her.*"

Emma Oliver, another state's witness, on her cross-examination, testified that she knew Lettice Howell had *white blood in her.* These were the only witnesses examined on this point.